Numerous authorities will be cited under this heading to show the soundness of this contention, and that no defense of any kind, nor any motion could be filed before the motion for judgment was determined April 11, 1938, because it searches the record.

MOTION FOR JUDGMENT OF APRIL 11, 1938.

Record, page 2.

This motion was filed in response to an accepted challenge by the court that a judgment could be sustained on an issue for injunction and an issue on the merits of the case, and that the subject of an injunction as a remedy might be intermingled or joined with a suit to recover money on a mortgage, and a suit to recover money, had and received, and for damages. It was our contention that the application was, as the plaintiffs contended, a suit to recover money and damages, and that the suit in respect to an injunction was, like an attachment, an incident to a cause of action. We offered to put in evidence also affidavits showing that there was no service, but the court declined to act pending the consideration of the injunction, and left the action standing as it was on April 11, 1938. The Court has consistently held to his opinion, which under all the authorities, is without support.

Under the decision of the Erie Railroad vs Thomkins 304 US 64 the statutes which are hereinafter quoted became substantive law in this case. If a case had been on trial in a state court on the same record, an answer would have been necessary in spite of the motion to dismiss, although a demurrer would have

been the proper proceedure in the State Court, so that the motion for judgment on the pleadings, found all of the allegations in the petition, accepted and admitted when the case went to the three judge court, and this is the record at this time. Rec.

If this was not true, any judge of a District Court could defeat a jury trial on common law issues by denying injunction, enter a motion of dismissal of the petition, as to an injunction, and then claim that the merits of the case were disposed of. Both the Court of Appeals of Kentucky and the United States Supreme Court have uniformly held that a judgment in this respect would be no bar to proceeding to trial upon the merits, and the rules of the Supreme Court so provide. If the defendants had filed an answer setting up an equitable issue, there would be some reason in the court's contention, but not on this record. The Auditor should have sued, and the attorney general should have joined.

THE PARTIES DEFENDANT.

Before a motion to dismiss was filed in this case, an answer should have been presented showing that the defendant had authority to appear, and his counsel therefore had authority to appear, otherwise no motion to dismiss could be entertained. But that issue the Court denied of hearing.

Section 112-5 prohibits the employment of counsel otherwise than under this statute.

> "No State Officer, Board of Trustees or the head of any department or institution of the State shall have authority to employ or to be represented by any other counsel or attorney-

at-law, unless an emergency arises, which in the opinion of the Attorney General, requires the employment of other counsel."

This complete statute provides the method of the employment, the amount agreed on and the recordation in the office of the Secretary of State, which facts would have been determined by affidavits on the final hearing on the motion to dismiss, afterwards filed, and on the motion for judgment on April 11, 1938, and on the motion for summary judgment, denied by the court, all hearings denied by the court as to facts.

Section 112-7. Record of money collected, to be kept; Records to Governor.

"The Attorney General shall be required to keep in his office a book showing the exact amount of moneys collected by him from all sources, and due the State, and what disposition has been made of said moneys and he shall biennially on or before the 31st day of December, beginning with the 31st day of December, 1909, report to the Governor a full statement of the business done in his office and moneys collected by him and the dispositon made of same. He is empowered to purchase such books as are necessary to carry out the provisions of this section to be paid for out of the State Treasury."

Commonwealth vs. Roberta Coal Co. 186 Ky. Page 402.

"The applicable law may be found in section 1215 (now Section 112 to 115, Act of 1908, Chapter 32, Page 85, and again amended in 1934). He shall with the assistance of the Auditor of Public Accounts investigate the condition of all unsatisfied claims, demands, accounts and judg-

ments in favor of the Commonwealth, and shall take all necessary steps, by motion, action or otherwise, to collect or cause to be collected, such claims, demands, accounts, and judgments, and pay into State Treasury."

THE ATTORNEY GENERAL'S AUTHORITY.

The Attorney General had full authority to bring this action, but disappeared from the action because of liability that he would assume on his bond by the seizure of this property in the name of the Internal Revenue Commission. The authority, however, for appearing in this cause was given by the Internal Revenue Commissioner not to Harry D. France, Attorney for Com'sr, but there appeared private counsel, under a contract unauthorized by law. The decisions supporting our contentions are:

Gordon vs Morrow, 186-Ky. 717.

"Authority must be shown, or it is the duty of the Court to dismiss the action without predjudice."

Alexander vs. Wright, 3 AK M-189

Belt vs. Wilson 6 JJM 495

Com. vs. Louisville Property Co. 128 Ky. 790

4 Cyc. 928. Noble vs State 3 A. K. M.

FRANKLIN CIRCUIT COURT HAD NO JURISDICTION. (Sec. 976 Carroll's Code)

FRANKLIN CIRCUIT COURT JURISDICTION IN COMMONWEALTH CASES.

"The Franklin Circuit Court shall have jurisdiction, in behalf of the Commonwealth, of all cases, suits and motions against Clerks of Court, Collectors of Public Money and all public debtors and defaulters and others claiming under

them; and for this purpose its Jurisdiction shall be co-extensive with the State."

The Code of Kentucky, Section 117, provides:

"Pleadings of the Commonwealth must be verified by the official or agent who is authorized by law to have the suit brought."

The State Alcohol Liquor Board is composed of five members. They did not authorize the bringing of this suit, nor did the plaintiff show any authority for such action, State Court authorizing the Internal Revenue Commissioner, as an officer, to bring the suit, of attachment. If, as contended, they had a right to assess the taxes, (nor is it shown herein that they did assess the taxes at a hearing where notice was given to the Central Company ($1,400), of penalties which were attempted to be collected, without such hearing), but were assessed by a field agent and an attorney who had no authority to appear in the case, an employee of Clifford Smith (J. J. Leary). They must allege it. Thus it may be seen that if the Liquor Board had the authority to bring the action, it was necessary for the Revenue Commissioner to show certain facts, by some pleading to the court, inasmuch as service of summons was made on him, but if his default was clear on the record, no motion could be made for him to appear and answer unless he complied with the requirements of the Code, as recited herein. Motion for judgment on the pleadings therefore should have been the only matter to be considered after the motion to dismiss *was passed on by the three judges.* In other words the court should have called up the matter to determine the further proceedure in the case on the motion for

judgment, inasmuch as the motion to dismiss applied to nothing but the injunction.

Section 679 of the Carroll's Code provides:

> "The authority conferred by law upon three or more persons may be exercised by the majority of them concurring; and an act directed by law to be done by three or more persons may be done by a majority of them concurring."

Therefore, it has been held that a quorum of the Board of Tax Supervisors was authorized to perform the duties of the Board. This is the statute governing the assesment of taxes in respect to Boards in Kentucky, both local and State.

The Court of Appeals of Kentucky said, in the City of Corbin vs. Board of Education, Vol. 206, Ky. 787.

> "Action of the Board of Tax Supervisors is final, subject to right of appeal. The jurisdiction of the Board of Tax Supervisors is supervisory in its nature and unless express authority should be conferred elsewhere or Board should act arbitrarily or fraudulently, its work in supervising tax lists of assessors is final, subject only to right of aggrieved party to review its' action in his case by some method provided by statute."

No Jurisdiction Unless Trustee is Party.

Ex. N, C pgs. 9-44.

It is necessary to set up Denial by answer or defense to a pleading where a mortgage is alleged in a petition before there can be a claim of lien on the part of the Commonwealth or other person claiming a superior lien. Among the jurisdictional facts, in order to present *the right to appear* it was necessary for the

defendant to appear and set up his right to plead, which would have asserted defendant's lien in this case if any, and asserted the right of the Commonwealth to appear by proper defendant and by proper counsel. *These are all jurisdictional facts.* A motion to dismiss defeats only injunction relief.

Section 692 is authority for what is said, as a requirement of the Kentucky Code. No cross petition served by summons is necessary, and defendant will not be permitted to withdraw from the case or abandon a reply or answer so as to inform the court of the above facts. A motion to dismiss plaintiff's petition, unless the motion sets out these facts, will not lie, cannot be entertained by the court in respect to the merits of the action; and a motion for judgment, will, in the absence of such a pleading be sustained.

> "Sale of property cannot be made, and the judgment is void, unless it is made subject to the lien of the senior mortgage."
>
> Fisher vs. Evans 175 Ky. 300.
>
> Guill vs Corinth, 24 R-482.

The Court of Appeals has frequently held that where action is brought to foreclose a mortgage, and the petition shows that the mortgage is recorded, there can be no sale of the property or assets until the merits of the petition are disposed of. In other words, an issue may be set out in a petition, and if undisposed of by the judges, an independent action may be sustained *on this issue.*

A cause of action cannot be dismissed by mere motion to dismiss the petition, in respect to the grounds set out for injunction relief.

THE AUTHORITIES OF THE FEDERAL COURTS AND KENTUCKY ARE AGREED.

> "The principle that you can decide the merits of the case before deciding the pleadings, which control the evidence, I am unable to reconcile with any sound principle of law, for it may be, that jurisdiction may depend on the facts as shown under proper pleadings. This is not to say pleading may not be amended. Legislation, otherwise, within the scope of the acknowledged state power, not unreasonably or arbitrarily exercised cannot be condemned, because it curtails the power of individuals to contract ,but each separate power must be exercised and within a single statute. Raising revenue is the exercise of one power and it has slight relation to the exercise of police power."

And again it was said by the Supreme Court:

> "The obligation to pay taxes is not penal, it is a statutory liability quasi-contractural in nature, enforcible, if there is no exclusively Statutory remedy, in the civil courts by the common law action of debt or indebitatus assumpsit." Due process, Alaska U. S. 294-154.

Milwaukee County vs White Co. 296 US 268.

This is the law of *this Sixth Circuit,* and the motion to dismiss transfers to the law side where jury trial must be had.

Illinois R. Co. vs. R. R. Commission of Ky. 1 Fed. (2) 805;

> "Since we think the requirements of Section 266, Judicial Code (Comp. St. 1243) have been met by the hearing which has been had, and by the filing of this memorandum approved by the three judges, the order presently continuing the restraining order as herein directed, and the preliminary injunction to issue, if there is no further

showing to be made, will be entered *by the District Judge of this District, sitting alone. He will also pass upon the motion to dismiss the bill.* The court as now constituted may consider the *grounds* of such a motion as they *bear* upon the motion for injunction, but can make no order, *except to grant or refuse the injunction, or restraining order."* They could not issue order of dismissal.

Such is the rule in other districts.

Chandler vs. Neff.

298 Fed. Rep. 518: "Plaintiff contends that the Act of March 4, 1913, which now appears in the statutes as Sections 266 of the Judicial Code (Comp. St, 1243) having enlarged by statute the jurisdiction of a court of equity, and gives it a cognizance of suits which involve the constitutionality of an act of a state, in requiring the presence of three judges in passing upon a question of importance. The Purpose of this act was not intended to, and does not, enlarge the equity powers of this court. Generally speaking, the object of the statute was to limit the powers of a Judge of the U. S. District Court, who theretofore had passed upon the constitutionality of state laws, and had exercised *singly* the right to award or withhold injunctions as to their enforcement. The amendment, so far as the presence of three judges is concerned, limits their functions to hearings upon the question of issuance of temporary interlocutory restraining order, and does *not extend to the case on its merit.* Before the additional judges should be called to the assistance of the District Judge sitting in the case, it must appear from the allegations in the petition that a cause of action is stated, which on its face, entitles the plaintiff to the relief sought; therefore the court as now constituted is authorized to judge of the sufficiency of the plaintiff's petition in point of law. The court sustains the first ground mentioned."

Counsel for defendant by proceeding in the Circuit Court of *Franklin County,* seems to be of the opinion that the case in the Federal Court has been disposed of. There was no final decree. What was determined was merely the right of injunction. So decided the Supreme Court. That, having been determined, the order of dismissal applies alone to that right, and other causes of action even in respect to taxes remain. That this was squarely decided in the 9th Circuit in the Case of City and County of San Francisco vs. McLaughlin, 9 th Fed. (2) 390, there is no doubt. (Denial of injunction not final order).

> "Order granting motion to dismiss bill in equity under equity rule 29, unless followed by final decree, is not final order."
>
> "Under Equity rule 29, demurrers are abolished and every point of law arising upon the face of the bill, whether for misjoinder, nonjoinder or insufficiency of fact, to constitute a valid cause of action in equity, which may heretofore have been made by demurrer or plea, shall be made by a motion to dismiss, or in the answer. The *mere granting of a motion to dismiss under this rule, unless followed by a final decree,* amounts to nothing more than a determination on the part of the court that the bill is open to one or more of the objections urged against it, and the order on the motion was not final, any more than is an order sustaining a demurrer to a complaint in an action at law. In either case the suit or action is STILL PENDING; and must be determined by final decree by judgment before this court can acquire jurisdiction by appeal. Counsel for appellant seems to nave labored under the impression that a final decree had been entered. The appeal must therefore be dismissed for want of jurisdiction."

NO DETERMINATION OF THE MERITS.

The 2nd Circuit Court of Appeals, decided the same in the case of Harrup vs Stoneham, et al; (lost citation).

> "A decision or order to be appealable under Judicial Code 128 must be not only valid but complete, and final as to all parties, and whole subject matter, and all causes of action involved."

The cause of action here involved, to-wit, *the foreclosure of the mortgage* was not considered at all in the motion to dismiss as shown above. The court, discussing that question, in the above case says:

> "The decision under Judicial Code 128 must be final. The decision or order must be not only final, but complete and final. Not only as to all parties, but as to the whole subject matter, and as to all of the causes of action involved."

This question was decided in U. S. Supreme Court, in Collins vs. Miller, 252 U. S. 364, at Page 370, 40 St. 347, (64 L. Ed. 616) and in Stromberg vs. Arnson, 239 F. 891, (153, C. C. A. 19). In the Collins case the court said: Petition Ex. C. Co. pg. 47.

> "It is the duty of this court in every case in which its jurisdiction depends on the finality of the judgment under review to examine and determine whether the questions raised by the parties are decided. The judgment must be not only final but complete, and the rule requires that the judgment to be appealed should be final not only as to all parties but as to the whole subject matter, and as to all the causes of action involved."

Ia. Navigation Co. vs. Oyster Commission 266 U. S. 99:

> The court again said, "If a judgment does not finally dispose of some elements of the con-

troversy, unless it is final on its face as to the entire controversy, this court will not review it.

The Court further says in the opinion: "We must look to the judgment for the purpose of ascertaining its finality."

Norfolk Turnpike Co. vs. Va. 225 US 264.

"Where equitable and common law actions are shown in one petition and a motion to dismiss is made, the bill shows no grounds for equitable relief."

Ansehl vs. Puritan Co., Hunter vs. Glade, Fed. Life Insurance Co. (8) 103 F. (2) 192.

"The Court, where a motion to dismiss is sustainable may deny the motion and direct the plaintiff to amend his bill."

Swift vs. Inland Navigation Co. 234 Fed. 375.

Rule 29.

"The motion to dismiss must therefore be denied, reserving to the defendants the right to take by answer whatever advantage might otherwise have been secured by the motion. Rule 29 permits any point of law which goes to the cause of action, as stated in the bill, to be called up and disposed of at any time until the final hearing at the discretion of the court.

"The preliminary motion to dismiss must be denied, unless it is shown by the allegations, which are taken as true upon final hearing, cannot be sustained."

O'Keiffe vs. New Orleans, 273 Fed. 560 and 280 Fed. 92 8th Circuit.

"Judicial Code 266 requiring that motion for a temporary injunction to restrain the enforcement of a statute by an officer to be heard by 3 judges *is inapplicable on motion to dismiss the complaint,* which, under rule 29 is equivalent to

a demurrer on the bill, if the motion is refused and no answer be interposed, the decree would be final, and a final injunction would issue. Where an interlocutory injunction is applied for under section 266 a *motion to dismiss may be interposed before the single judge.* Section 266 applies only to temporary injunctions. If the motion to dismiss is entertained and sustained, it should be adjudicated by the judge of the court and under the rules and practice amendments should be allowed to the complainant."

Supreme Court of the United States, *in this cause,* held:

"Apart from that question, the Commonwealth insists that appellants had a plain adequate remedy by appearing in the attachment suit in the Franklin Circuit Court where all issues as to the validity of the tax and the propriety of the proceedings for enforcement could be litigated and determined, with the ultimate right of review in this court. Then a Federal question raised and decided. Appellants also state that in the present suit they asked the Federal Court to exercise its equity powers in their aid in the foreclosure of the mortgage, but it is apparent that this relief is merely incidental, and that the main object of the suit is to restrain the proceedings in the Franklin Circuit Court which had been brought to enforce the collection of the taxes." The main object was foreclosure taxes and damages.

A suit on a note is a common law issue under the rules of procedure in Kentucky.

"The section of the Federal statute which prohibits the maintenance by plaintiff of a suit in equity where an adequate remedy at law is available may not maintain a suit in equity if he has opportunity to impose a defense at law or as an action that might be maintained at law in an independent suit."

The decision of the three judge court is a bar to the action of the District Court in denying the right to docket the case.

MOTION OF DEFENDANTS

> "And as reasons for said motion state that plaintiff's herein have a plain, adequate and complete legal remedy, and that this court is without jurisdiction to grant the relief prayed for in plaintiff's petition as amended."

The Court said in its order:

> "It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act" furnishes petitioners and adequate remedy in Section Twelve (12) (Fol. 47) of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act."
> C. Pet. pg. 87.

NO OTHER REMEDY AND NO OTHER OPPORTUNITY.

The trial court denied the introduction of any evidence for the purpose of determining the jurisdiction of the court after the mandate had been returned to the District Court and arbitrarily refused a hearing on the summary judgment so that the petitioners herein, have been compelled to make as a part of the petition for certiorari the evidence in the case and the orders of the Court in the case of J. W. Martin et al, vs. Central Distributing Co., et al with the plaintiffs in this action having specially appeared in that action, and the controversy being between the same parties on the same subject matter we consider that we have a right to make such orders and such evidence, as was adduced there, a

part of the petition in this action, since we would have no other remedy. The appearance in the State Court was exclusive of consideration of the merits at the time of the appearance of the plaintiff's in this action in order to raise our objections to the jurisdiction of that court.

And in this connection we show that the court of Appeals of Kentucky has frequently decided that there is no pending action in the State Court in respect to the plaintiffs, and that the Franklin Circuit Court has no jurisdiction as shown on page 20 of the petition of the Central Distributing Co. (Harry Bayer) and on Page 19 of said petition (Eleanor Webster), and on page 17 of (William Ploss), service agents, and on page 16, showing the order of attachment issued to (William Ploss), service agent, directed to one Phillips, Sheriff of Franklin County; and service on Harry Bayer who was no officer of the Corporation, signed by Louis C. Sickmeier, a person to whom the order of attachment was not directed and no explanation of his authority.

ATTACHMENT ORDER

"A public offense, of which the only punishment is a fine may be prosecuted by penal action, under Section 11 of the Criminal Code in the manner provided for Civil Action, but where the penalty is a fine and imprisonment, the action must be brought where the offense was committed under indictment and by the Commonwealth Attorney. But an action which requires a plea of "not guilty" is not such an action as may be brought where the offense was committed under indictment and by the Commonwealth Attorney." See Section 11 of Criminal Code and Section 469 of said Code Title 1,

L. and N. vs. Commonwealth 112 Kentucky Page 640.

Commonwealth vs. Avery 77 Kentucky 625

Morrell vs. Commonwealth 129 Page 729 198 S. W. 762

Boyer Wheel Co. vs. Taylor Co. 104 Page 742

106 page 165

18 Ky. Rep. 647

104 Ky. 726

104 Ky. 735

Helm vs. James, 129 Ky. 239

Com. vs. Long 30 S. W. 629

Stat. Sec. 22 Act. April 30-36, fine $1000 jail one year.

The imprisonment clause is as follows:

SECTION 22, ORIGINAL TAX ACT: (1936) PENALTY CLAUSE.

"In addition to the remedies herein granted, the Commonwealth for such violations, any person who shall violate any of the provisions of this act will also be deemed guilty of a misdemeanor and punished by fine of not less than $50.00 nor more than $1000.00, or by imprisonment of not less than 30 days nor more than one year, or by both such fine and imprisonment."

AUDITOR MUST SUE.

Section 10 of the Original Act 1934:

"On the failure of any person, liable therefor, to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall be deemed delinquent, and a penalty of twenty per cent on the amount of license tax due shall attach, and the *Auditor* shall at once

cause such proceedings to be instituted for the collection of such license, with such interest and penalties as may be provided by law for the collection of other taxes."

In the Morrell Case it is said:

"The business was carried on in the county in which the proceeding was instituted (this is right). The offense consisted in carrying on the business in violation of law. In case of this kind the cause of action occurred where the act was done. The Act here which entitled the commonwealth to demand the penalty was committed in Franklin County, and this court had jurisdiction."

"Sections 4028-29 provides that the penalty must be enforced or may be enforced in the county where committed. ALL PENAL ACTIONS must be prosecuted by the Commonwealth's atty. Section 4281 Statute

Atterbury vs. Waldeck 207 Ky. 618.

Commonwealth vs. Grand Central 97 Ky. 325

Harris vs. Beaven 11 Bush 254

Thompson vs. Carr 13 B. M. 215

NO PERMISSION GIVEN TO SHOW THE ATTACHMENT VOID, BECAUSE NO LEGAL PETITION WAS FILED IN THE STATE CASE. Denials of Equal protection. (pg. 16, C. C. petition).

"The filing of a petition and service of summons on an officer of the corporation or the service agent at or before the filing of the attachment cannot be waived."

Appleton vs. Trust Co., 244, Ky., 253.

"An attachment must be served on an officer of the corporation at its place of business or on the service agent designated by statute (this

service agent was William Ploss). If there is no allegation that a summons has been returned with the endorsement of service on an officer of the corporation or the service agent, attachment is void."

Redwine vs. Under, 101 Ky., 190, 72nd section of Carroll's Code of Kentucky.

"In order to acquire jurisdiction, the petition must be filed and summons must issue and be served concurrently with attachment or before attachment." Kelly vs. Stanley 86 Ky. 240.

Sec. 2524 Carroll's Statutes.

The remarkable action of the both the Circuit Court of Appeals and the District is not to be accounted for on any reasonable legal hypothesis. The District Court was arbitrary, and the Circuit Court of Appeals would make no findings. The law fitting both courts is aptly termed by the Supreme Court of the United States, referring to a state Board in each case.

"So long as the right to make a full defense is not cut off, the Act is not rendered unconstitutional and does not deny the equal protection of the law."

But here is an absolute denial in the Circuit Court of Appeals to allow an appeal from the District Court and denial of a mandamus to require the court below to perform a positive right. Neither of them would make findings, so Plaintiffs come to the Supreme Court of the United States in the dark.

Mobile Railroad Company vs. Turnpike Co. 219 US 35

170 Federal 1023 (same case)

Lindsley vs. National Carbonic Co. 220 US 63

The Supreme Court of the United States in the—

Ohio Tax Cases 232 US 576, said:

"The issues made by the petition extends the jurisdiction of all questions presented, irrespective of whether it is necessary to decide them all."

So this court in a Kentucky case decided the same thing.

L. and N. Railroad vs. Finn 235 US 601.

The Kentucky Code provides that on the merits there must be an issue made and tried where petition states a cause of action, and no judgment may be had where there is no defense filed if the petition states a cause of action, proceeding must be exparte from the 30 days after default, and so this is the Federal rule.

In Deitch vs. Southern Railroad 53 Fed. (2) 97

Kentucky and Tennessee Power Company vs. City of Paris 48 Fed. (2) 795

Fordson Coal Co. vs. Jackson 7 Fed. (2)

Asher vs. Fordson Coal Co. the Court held, in 249 Ky., 117, that a judgment rendered where there was no revivor of the action, the judgment rendered was void, whether issues were made up or not.

The Federal Statutes and rule 60 provide that six months default ends the pleading, and the cause, so far as the party in default is concerned.

Texas vs. Wilder 92 Federal (2) 933, is fatal to further pleadings and must be complied with.

The Court of Appeals of Kentucky decided that

where an action was not brought in the place where the corporation was doing business there could not be a valid judgment, and injunction would lie.

Barbour vs. Newkirk 63 Ky. 631

Life Ins. Co. vs. Edwards 247 Ky. 136

Bankers Life case 254 Ky. 686

If the petition would be good against a special demurrer, a cause of action is stated, and the merits must be determined, if not the dismissal order is a void judgment.

Bruslove vs. Corson 176 Ky. 829

Central Distributing Company in their motion for JUDGMENT on the record shows that their judgment was good.

> "The Defendants, now, Central Distributing Company, Inc., move the Court for JUDGMENT on the issues made by the pleadings on the issue of jurisdiction, and on the issue involving the merits of the case."

The Petitioners joined in the same motion after return of the mandate, but the court refused to hear any facts or make conclusions of law on such an issue. There are two pages of grounds alleged here, which called the courts' attention to all issues.

Brown vs. Pacific Mutual Life 62 Fed. (2) 711

A MOTION TO DISMISS WAS FILED; FINDINGS WERE PROPOSED TO THE DISTRICT COURT AND CONCLUSIONS OF LAW: DENIED.

Under the law there is no final judgment rendered in this cause, so that Certiorari will lie, and ought to lie with direction.

Eastman Kodak Co. vs. Gray, 292 U. S. 337

In this case the Court says:

"Special findings requested which raise legal propositions presented to the court require ruling, which will cause the case to be remanded if not made." (Ex. F. pg. 42, C. Co. petition).

Lewellyn vs. General Elec. Co. 275 US 243

Hardey vs. Malley 288 U. S. 415
General Motors vs. Swan 44 F (2) 24
Gerlach vs. C. R. and P. RR. 65 Fed. (2) 867

Hawthorne vs. Bankers' Life Co. 63 F. (2) 971

Merrian vs. Kusselman 45 Fed. (2) 983
28 USCA Sec. 773

Interstate Life vs. Klaber 50 F. (2) 154
American Surety Co. 58 Fed. (2) 234

Such denial as amounts to no hearing when the facts are necessary to determine jurisdiction is a denial of the equal protection of law.

Lindsley vs. National Carbonic Company 220 U. S. 63

Mobile RR Co. vs. Turnpike Co. 219 US 35

FACTS DETERMINE JURISDICTION—MUST BE A HEARING:

"No judgment of a court is due process of law, if rendered without jurisdiction in the court and notice to the opposing party according to

law — according to the principles in enforcement of private rights."

Scott vs. McNeal 154 US 34

Windsor vs. McVeigh 93 US 274

Taylor on Due Process Sec. 138

The facts alleged in a petition are admitted on a motion to dismiss, and if a cause of action is stated, petition will support a judgment. Motion for judgment must be acted on.

Royal Indemnity Company vs. Woodbury Granite Co 101 F. 689

Globe Steel Co. vs. National Metal 101 Fed. (2) 489

Original Statute did not permit of Appeal from a judgment or decree on the allowance or denial of an interlocutory injunction, but since the Amendment and section 266 such an appeal is allowed and further action may be stayed on the merits, or, the District Court may proceed.

"It is well settled that a case may not be brought (Supreme Court) here except when the decree is complete and final as to all parties and the subject matter, and as to all of the cause of action."

Hohorst vs. Picket Co. 148 262 (Ex. Q. pg. 46, C. C. pet.)

Onedia Navigation Corp. vs. Job 252 US 521

Arnold vs. US 263, US. 427

Thompson vs. Murphy (8th Circuit) 93 Fed. (2) 38

Findings or Conclusions of law must be made to determine the decision of the Court.

Hobbs-Westinghouse Co. vs. Employer's

Liability Corp. 102 F. (2) 32

Baldwin vs. Higgins 100 Fed. (2) 405

If there is one cause of action remaining in the petition the decree is not complete nor is it a final judgment.

Kilmer vs. Griswold 67 Fed. 1017

Hill vs. Chicago RR. Co. 140 U. S. 52

Ex Parte Enameling Co. vs. 201 US. S. 156

THE STATE LAW OF KENTUCKY AS TO PLEADING CONTROLLED UNLESS PROVIDED FOR IN THE FEDERAL RULES OR STATUTE:

An answer to an interlocutory petition must be filed but cannot be sustained unless a controverting affidavit is filed.

Rules, 27 Vol. C. C. A. reports
Shumaker vs. Security Co. 159 F. 113
Pleadings must comply with state practice.
Rev. Statutes Sec. 914 U. S. Compiled 1901, page 684

In Webber vs. Webber I Metcalfe 18, it is held that an attachment order must be served by the officer to whom it is issued.

In Case vs. Colston I Metcalfe 145, it is held, under the Code, service, of a summons must be made by any officer who is authorized to serve process, but an attachment order directed to a Sheriff or other officer must be served by the officer to whom it is

directed, or the attachment is void. Thomas vs. Mahonney 9th Bush 111—Speckert vs. Manderson, 79 Ky.

The leading authority in Kentucky followed by the Court (667 Code 509) is the case of Taylor vs. Breeze 63 Fed. 678 in respect to interlocutory orders, and this court never held otherwise than that the merits must be tried out and may be tried pending appeal or allowance in respect to such injunction..

The Taylor vs. Breeze case holds: "Interlocutory does not mean to decide the cause but that which decides a temporary remedy and before a final hearing on the merits."

> The Court says: "Let the case be remanded for such failure with permission to make such defense to the petition as they find proper."

We therefore respectfully SUBMIT that in the interest of Justice and a fair administration of the law this case should be remanded with directions to determine the issue and permit the introduction of evidence, otherwise it will not be done by mere reversal of the acts of the court. This court must in a very specific way tell the trial court what the law is and what must be done—follow the plain written decisions and statutes governing the case.

Respectfully,
HARVEY H. SMITH,
Attorney for Petitioners.

I confirm:
GEO. E. WHITMAN,
Attorney for Central Co.

Note: Record pages will be supplied.